Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

MICHAEL SALVAGNI, in his official capacity as Gallatin County Attorney,

Petitioner,

v.

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D.; SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General of Montana
CLAY R. SMITH
Solicitor
Counsel of Record
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Is an immature minor's access to an abortion unduly burdened by a judicial bypass provision that conditions waiver of a parental notice requirement upon determination that such notice is not in her best interests?

LIST OF PARTIES

The Petitioner is Michael Salvagni in his official capacity as County Attorney for Gallatin County, Montana.

The Respondents are Susan Wicklund, James H. Armstrong, Lindsay Richards, Susan Cahill, Douglas Webber, Beth E. Thompson, Mary Stranahan, and Mark Miles.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Salvagni, in his official capacity as County Attorney for Gallatin County, Montana, respectfully requests that a writ of certiorari issue to review this opinion and judgment of the Court of Appeals for the Ninth Circuit entered in the proceeding below on August 16, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 93 F.3d 567 and is reprinted in the Appendix commencing at page 1a.

The opinion of the District Court is unreported and is reprinted in the Appendix commencing at page 13a.

JURISDICTION

Respondents challenged the constitutionality of the Parental Notice of Abortion Act, 1995 Mont. Laws ch. 469 (codified at Mont. Code Ann. §§ 50-20-201 to -205, -208, -209, -211 & -215 (1995)) under, inter alia, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jurisdiction before the District Court existed under 28 U.S.C. §§ 1331 and 1343. On September 27, 1995 the District Court entered judgment declaring the statute unconstitutional and enjoining its enforcement. Pet. App. 35a. On October 6, 1995 the Petitioner filed a notice of appeal from the judgment. Appellate jurisdiction existed below under 28 U.S.C. § 1291.

The Court of Appeals for the Ninth Circuit issued its opinion and judgment affirming the District Court's judgment on August 16, 1996. Pet. App. 1a. The Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc on August 28, 1996. The petition for rehearing was denied on October 24, 1996. *Id.* 33a. Jurisdiction of this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Montana Parental Notice of Abortion Act provides in relevant part as codified in Mont. Code Ann. § 50-20-212(4) and (5) (1995):

> 50-20-212. **Procedure for judicial waiver of notice.**
>
> . . . .

> (4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.
>
> (5) The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that:
>
> (a) there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian; or
>
> (b) the notification of a parent or guardian is not in the best interests of the petitioner.

The entirety of the Parental Notice of Abortion Act is reprinted in the Appendix commencing at page 23a.

STATEMENT OF THE CASE

This litigation was commenced under 42 U.S.C. § 1983 in November 1993 as a challenge to the parental notice provision in the Montana Abortion Control Act, Mont. Code Ann. § 50-20-107(1)(b) (1993). That provision, unchanged since its enactment in 1974, prohibited performance of an abortion "in the absence of . . . the written notice to a parent, if living, or the custodian or legal guardian of [the] woman if she is under 18 years of age and unmarried." No judicial or other bypass procedure

was provided under the Abortion Control Act for waiver of the notice requirement. In December 1993 petitioner Salvagni, the County Attorney for Gallatin County, Montana and the only defendant, stipulated to a judgment declaring this notice provision unconstitutional and enjoining its enforcement.

In 1995 the Montana legislature repealed § 50-20-107(1)(b) and adopted the Parental Notice of Abortion Act, 1995 Mont. Laws ch. 469 (codified at Mont. Code Ann. §§ 50-20-201 to -205, -208, -209, -211, -212 & -215 (1995)). Pet. App. 23a. The Act prohibits a physician from performing an abortion upon a minor or an incompetent person unless that physician or a referring physician has given 48 hours' actual notice to one parent or legal guardian of the patient concerning the intent to perform the abortion. § 50-20-204.[1] An alternate notification procedure is provided when actual notice has not been possible after a reasonable effort. § 50-20-205. Notice need not be given in several situations, including when it is waived judicially under § 50-20-212. § 50-20-206.

The judicial waiver process is confidential and initiated by the minor in the Montana youth court with a petition stating she is pregnant and unemancipated. § 50-20-212(2)(a). The youth court may appoint a guardian ad litem, while the petitioner may request court-

[1] The term "minor" is defined as "a female under 18 years of age who is not an emancipated minor." § 50-20-203(6). The term "incompetent person" is defined as "a person who is an incapacitated person or a protected person who has a guardian appointed pursuant to [Montana statutes]." § 50-20-203(4).

appointed counsel. *Id.* The court is directed to issue findings of fact and conclusions of law within 48 hours of the petition's filing unless an extension of time is requested by the petitioner; should findings and conclusions not be issued within that period, the notice requirement is deemed waived. § 50-20-212(3). The youth court must grant the petition if, by clear and convincing evidence, it finds "that the petitioner is sufficiently mature to decide whether to have an abortion" (§ 50-20-212(4)), "there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian" (§ 50-20-212(5)(a)), or "the notification of a parent or guardian is not in the best interests of the petitioner" (§ 50-20-212(5)(b)). A petition's denial may be appealed to the Montana Supreme Court. § 50-20-212(8). The Act was scheduled to take effect on October 1, 1995.

In July 1995, however, the Respondents were granted leave under Fed. R. Civ. P. 15(d) to file a supplemental complaint. The complaint alleged Chapter 469 violated the substantive due process and equal protection rights of minor women under the Fourteenth Amendment and asserted jurisdiction under 28 U.S.C. § 1343. With respect to the due process claims, the Respondents contended that the confidentiality of a minor's identity would not be maintained because, under their construction of Mont. Code Ann. § 41-5-502(1) (1995), summons and proceedings under the Montana Youth Court Act generally must be served on the affected youth's custodial parent and because, under § 50-20-212(2)(b), any allegation of physical, sexual or emotional abuse as a basis for waiver of the notice requirement must be treated as a report under

Mont. Code Ann. § 41-3-202. The Respondents contended further that, by not requiring the Montana Supreme Court to adopt an expedited appeal process, the statute failed to provide an adequate bypass procedure. The equal protection claim alleged that Chapter 469 discriminated against a minor woman because, although requiring notice to a parent of such woman, the statute did not require notice "to the parent of the unmarried male who impregnated her."

In opposing the Petitioner's motion for summary judgment, the Respondents advanced for the first time the contention that the best interests criterion in § 50-20-212(5)(b) constitutes an undue burden because it fails to authorize waiver of the notice requirement if the youth court concludes that an abortion is in the minor's best interests – i.e., to pass constitutional muster the provision must authorize waiver if the court determines an abortion would be in the minor's best interests regardless of whether the evidence established the requisite basis for waiver of notice to a parent or guardian. The Respondents relied on *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (Pet. App. 37a), for this new contention.

The District Court addressed only the best interests issue. It first concluded, contrary to the Respondents' argument, that *Glick* was not dispositive because it "did not expressly hold that parental consent bypass standards apply in a notice context; instead, the statute was found unconstitutional on other grounds and the *Bellotti* [*v. Baird*, 443 U.S. 622 (1979)] problem 'only [added] to the infirmity.'" Pet. App. 18a. The court then "look[ed] to other courts for guidance on the issue" since, in its view, "[n]either the U.S. Supreme Court nor the Ninth Circuit

Court of Appeals [has] expressly decided what, if any, are the requirements of a judicial bypass procedure in a parental notice, as opposed to a parental consent, statute." *Id.* 19a.

The District Court's analysis of other circuit authority focused on *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996). Characterizing the decision as "the only one to have [addressed the issue] in a fairly thorough manner" (Pet. App. 19a), the court construed the holding in *Sioux Falls Clinic* that parental notice must be accompanied by "a '*Bellotti*-type bypass'" (*Sioux Falls Clinic*, 63 F.3d at 1460) as meaning "*Bellotti* standards [must be applied] to determine the scope of the 'best interests' inquiry" and reasoned that, "[u]nder *Bellotti* and *Glick*, a minor must have an opportunity to show not just that notification is not in her best interests, but that having an abortion *is* in her best interests" (Pet. App. 21a). It therefore concluded § 50-20-212(5)(b) "impermissibly narrows the scope of the 'best interests' inquiry[ ] and places an undue burden upon the right of a minor who is able to show that abortion is in her best interests to obtain an abortion without parental involvement." *Id.* The District Court did not address the Petitioner's argument that the best interests standard in § 50-20-212(5)(b) was either identical to or substantively indistinguishable from the best interests provisions in the bypass statutes approved by this Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The court did reject the Petitioner's contention that *Glick*'s reasoning was inconsistent with undue burden

principles as explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), with the comment that "*Casey* reaffirms that the State may not unduly burden a minor's access to abortion" and that "the imposition of a notification requirement, without an adequate *Bellotti-type* bypass provision, would constitute an undue burden." Pet. App. 21a n.5.

The Court of Appeals affirmed. Unlike the District Court, it reasoned that, "[w]hile there is some ambiguity in *Glick*, we cannot escape the conclusion that a reason for its holding that the Nevada provision was unconstitutional was that the judicial officer was required to determine whether parental notification, rather than the proposed abortion, was in the minor's best interests." Pet. App. 10a. Under law-of-the-circuit principles, the panel deemed itself bound by the prior decision. *Id.* 11a; *see, e.g., United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990). The Court of Appeals thus did not address the similarity of language between the Montana best interests provisions and those upheld in *Akron* and *Hodgson*, remarking only that "[e]ven if we thought *Glick* were inconsistent [with *Akron*], as a panel of this Court we would not be free to overrule it," and did not attempt to reconcile *Glick* with the later-decided *Casey*. Pet. App. 11a. The Petitioner's petition for rehearing with a suggestion for rehearing en banc subsequently was denied. *Id.* 33a.

REASONS FOR GRANTING THE PETITION

Perhaps no area of social policy is more sensitive than regulation of abortion. This Court thus observed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that only two other decisional lines – the debate over substantive due process engendered by *Lochner v. New York*, 198 U.S. 45 (1905), and the debate over the separate-but-equal doctrine flowing from *Plessy v. Ferguson*, 163 U.S. 536 (1896) – were "of comparable dimension" during the last century. *Casey*, 505 U.S. at 861. Because of its sensitivity, this area of law has produced a complex and, at times, rather bewildering jurisprudence. *See Hodgson v. Minnesota*, 497 U.S. 417, 479-80 (1990) (Scalia, J., concurring in part & dissenting in part). Quite expectedly, state legislatures examine closely the formulation of abortion legislation that the Court has found constitutionally adequate and, as here, follow that formulation. This is thus not a case where the law is unresolved; it is one where the law is settled and the Court of Appeals' decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), is simply wrong. Not only is the analysis in *Glick* at odds with *Hodgson* and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 507 (1990), but it also cannot be squared with *Casey* or the opinion *Glick* purports to follow, *Bellotti v. Baird*, 443 U.S. 622 (1979). The controversy, moreover, is not limited to Montana or even the Court of Appeals' jurisdictional reach since eleven other States, all but one outside the Ninth Circuit, have comparably-worded best interests provisions and since the Eleventh Circuit resolved the issue here in the opposite fashion only four days before *Glick* was issued. *Planned Parenthood Ass'n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462,

1476 n.21 (11th Cir. 1991). This Court should intervene to ensure doctrinal consistency is maintained.

I. *GLICK* IS INCOMPATIBLE WITH THIS COURT'S BYPASS PROCEDURE DECISIONS COMMENCING WITH *BELLOTTI*.

In *Bellotti*, this Court addressed the validity of a Massachusetts two-parent consent statute under which a superior court judge "for good cause shown" could authorize an abortion if one or both parents refused consent. *Bellotti*, 443 U.S. at 625. As construed by the Massachusetts Supreme Judicial Court, the statute required the superior court to withhold authorization for all minors, including those deemed mature, unless it determined that an abortion would be in the minor's best interests, and, except in unusual circumstances, precluded judicial authorization of an abortion without the minor's first seeking parental consent. *Id.* at 630.

Justice Powell's plurality opinion found those limitations "unduly burden[ed] the right to seek an abortion" (443 U.S. at 640) because a minor deemed sufficiently mature "to make intelligently the abortion decision on her own" (*id.* at 647) should be free to have that medical procedure without the necessity of even the superior court's consent. With respect to immature women, however, Justice Powell stated a "court may deny the abortion request . . . in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may defer decision until there is parental consultation in which the court may participate." *Id.* at

648. The *Bellotti* plurality opinion thus found no constitutionally-proscribed burden in a court's denying or delaying authorization of an abortion upon a determination that parental consultation was in the minor's best interests.

Because the *Bellotti* plurality opinion's discussion of the parameters of a valid bypass procedure was directed to a parental consent statute, an unanswered question was the extent to which a comparable procedure was constitutionally necessary in a statute conditioning access to abortions upon the less burdensome requirement of parental notice. *See H.L. v. Matheson*, 450 U.S. 396, 405 (1981) (upholding validity of Utah parental notice statute without a bypass procedure in as-applied challenge by unemancipated minor who "has made no claim or showing as to her maturity or as to her relationship with her parents"). This question was explored in *Hodgson* and *Akron*, cases involving the validity of parental notice statutes which also contained judicial bypass procedures. The Minnesota statute challenged in *Hodgson* provided then, and provides now, that, in resolving a bypass petition where a minor was not declared mature, "the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby." *Hodgson*, 497 U.S. at 427 n.9 (quoting Minn. Stat. Ann. § 144.343(6)(c)(ii) (West 1989)). The Ohio statute in *Akron*, also unchanged, provided that the court is required to authorize an abortion for an immature minor when "the

notification of the parents, guardian, or custodian of the complainant . . . is not in the best interests of the complainant." Ohio Rev. Code Ann. § 215.85(C)(2) (Anderson 1994)); *see Akron*, 497 U.S. at 508. The Ohio statute is thus identical to § 50-20-212(5)(b), while the Minnesota statute similarly requires the court to deny authorization for an abortion if notice to the minor's parents is deemed to be in her best interests.

Justice O'Connor's concurring opinion controlled in *Hodgson*, and she found Minnesota's two-parent notification requirement salvaged by the judicial bypass procedure "because the interference with the natural operation of the family required by [the notice provision] simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." *Hodgson*, 497 U.S. at 461 (O'Connor, J., concurring). Justice Kennedy's plurality opinion in *Akron* effectively equated the Ohio statute's best interests provision with that in *Bellotti* (*Akron*, 497 U.S. at 511) and, without deciding whether any bypass procedure is constitutionally required in a single-parent notice statute, observed that "it is a corollary of the great intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute" (*id.*).

The Ohio and Minnesota best interests provisions did not stand at the periphery of the Court's decisionmaking in *Akron* and *Hodgson*. This is especially apparent in *Akron*, where any suggestion that the Court was unaware of the nature of the best interests standard in the Ohio law belies the analysis in the plurality, concurring and dissenting opinions. Justice Kennedy, speaking for six members of the Court on this point, summarized the best

interests standard (*Akron*, 497 U.S. at 508) and explicitly found it consistent with *Bellotti*, while Justice Stevens in his concurring opinion advanced the view that the Court in prior decisions had "squarely held that a requirement of pre-abortion parental notice in all cases involving pregnant minors is unconstitutional" unless "the State- . . . provide[s] an adequate mechanism for cases in which the minor is mature or *notice* would not be in her best interests" (*id.* at 522; emphasis supplied). Justice Blackmun's dissent argued that a parental notice statute was "tantamount to a parental-consent statute" and therefore must contain a bypass procedure comporting with *Bellotti*, but his opinion did not identify the best interests standard as one of the many deficiencies he saw in the Ohio statute.[2] In light of the careful scrutiny given the Ohio law in these opinions, it can hardly be assumed the Court did not recognize the nature of the best interests standard it upheld. It instead is likely the determination concerning the consistency of the Ohio best interests formulation with *Bellotti* standards recognized that the minor variation in the best interests criteria merely reflected the differing focus of the bypass procedures – i.e., whether consent to a minor's abortion is appropriate

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[2] Justice Blackmun criticized the Ohio bypass process because it required a minor to choose among three forms when filing a bypass complaint (*Akron*, 497 U.S. at 527-29), lacked the requisite anonymity (*id.* at 529-31), failed to guarantee an expeditious decision (*id.* at 531-33), contained a constructive authorization provision which he believed served only "to frustrate the minor's right to an expedient disposition of her petition" (*id.* at 535), and impermissibly imposed a clear and convincing, rather than a preponderance, burden of proof on the minor (*id.* at 534-38).

as opposed to whether notice of an intended abortion to a parent is appropriate – and that, under *Bellotti*'s reasoning, even a consent bypass decisionmaker has the discretion to direct parental consultation when deemed in the minor's best interests. *See H.L.*, 450 U.S. at 420 (Powell, J., concurring) (restating view that under *Bellotti* "a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that *notification* otherwise would not be in her best interests") (emphasis supplied).

The Court of Appeals' error, however, seems plain without regard to *Bellotti*, *Akron* and *Hodgson*. The validity of a parental notice statute, no less than other forms of abortion regulation, must be measured against undue burden principles. *Casey*, as the most definitive statement of those principles, cannot be reconciled with *Glick*. The plurality opinion in *Casey*, while reaffirming the "essential holding" in *Roe v. Wade*, 410 U.S. 113 (1973), that a woman has the right to make "the ultimate decision to terminate her pregnancy before viability" (*Casey*, 505 U.S. at 869, 879), nevertheless made clear that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so" (*id.* at 877). Consequently, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.*

The best interests factor in § 50-20-212(5)(b) does not constitute such an obstacle because, at most, it requires parental notice where a neutral third party has concluded that an immature minor's interests would be furthered by such notification. *See Casey*, 505 U.S. at 895 (parental notice and consent statutes "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart"). Given the presumptive appropriateness of parental consultation, the contention that a best interests standard of the kind in § 50-20-212(5)(b) imposes an undue burden is implausible and conflicts directly with the reasoning and result in *Casey*. Confusion over, if not outright conflict between, this Court's rulings and lower court decisions concerning legislative authority in such an important area of social regulation should not be left unresolved.

II. THE COURT OF APPEALS' DECISION BRINGS INTO QUESTION THE VALIDITY OF PARENTAL NOTICE STATUTES IN NINE OTHER STATES WITHOUT ANY SUBSTANTIVE ANALYSIS OF THE BEST INTERESTS ISSUE.

It is hardly surprising in view of *Bellotti*, *Akron* and *Hodgson* that all bypass procedures in parental notice statutes employ a best interests standard substantively identical to the Minnesota, Montana and Ohio provisions,[3] while almost all bypass provisions in consent

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[3] Ark. Code Ann. § 20-16-804(1)(B) (Michie 1991) ("whether the performance of an abortion upon [the minor] without notification of her parents, guardian or custodian would be in her best interests"); Del. Code Ann. tit. 24, § 1784(b) ("it is in the

statutes use a standard identical to that approved in *Bellotti*.[4] The slightly different phrasing between these

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best interest of the minor that notification . . . be waived") (Interim Supp. 1995); Ga. Code Ann. § 15-11-114(c)(2) (Harrison 1994) ("the notice to a parent or . . . a legal guardian or person standing in loco parentis . . . would not be in the best interests of the minor); Ill. Ann. Stat. ch. 750, ¶ 70/25(d)(2) (Smith-Hurd Supp. 1996) ("notification . . . would not be in the best interests of the minor or incompetent person"); Iowa Code § 135L.4.3.e(2) (1996 Iowa Legis. Serv. No. 1) (West) ("notification is not in the best interest of the pregnant minor"); Kan. Stat. Ann. § 65.6705(d)(2) (1992) ("notification of a person specified in [the statute] would not be in the minor's best interest"); Neb. Rev. Stat. § 71-6903(1) (1993) ("whether the performance of an abortion upon [the minor] without notification of her parent would be in her best interests"); Nev. Rev. Stat. Ann. § 442.255.2(c) (1991) ("[t]he notice required by [the statute] would be detrimental to [the minor's] best interests"); and W. Va. Code § 16-2F-4(f)(2) (1995) ("notification to the person or persons to whom such notification would otherwise be required would not be in the best interest of the minor petitioner"); *see also* Md. Code Ann., Health-General, § 20-103(c)(iii) (Supp. 1995) (authorizing physician to omit parental notice when "[n]otification would not be in the best interest of the minor").

[4] *Compare* Ala. Code § 26-21-4(f)(2) (1992) ("performance of the abortion would be in the best interest of the minor"); Cal. Health & Safety Code § 123450(c)(2) (West 1996) ("performance of the abortion would be in the best interest of the minor"); Ind. Code Ann. § 16-34-2-4(d) (Burns 1993) ("an abortion would be in the minor's best interests"); Ky. Rev. Stat. Ann. § 311.732(4)(b) (Michie/Bobbs-Merrill Supp. 1995) ("performance of the abortion would be in the minor's best interest"); Me. Rev. Stat. Ann. tit. 22, § 1597-A.6.D(2) (1992) ("[f]ind the abortion to be in the best interest of the minor"); Mass. Gen. Laws Ann. ch. 112, § 12S (West 1996) ("performance of an abortion upon [the minor] would be in her best interests"); Miss. Code Ann. § 41-41-55(4)(b) (1993) ("performance of the abortion would be in the best interests of the minor"); Mo. Rev. Stat.

best interests standards makes practical sense because under a notice statute the minor, not a parent or a court, possesses final decisionmaking power concerning whether an abortion is warranted and because the bypass proceeding's sole purpose is to determine whether waiver of the *notice* requirement is appropriate. A court in a notice bypass proceeding, unlike one in a parental consent bypass proceeding, thus does not act as a surrogate parent with respect to the ultimate prudence of the requested abortion. Focus on the appropriateness of notification also makes constitutional sense because under a notice statute any burden arises from the requirement

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§ 188.028.2(3)(b) (1994) ("the abortion [is found] to be in the best interests of the minor"); R.I. Gen. Laws § 23-4.7-6 (1989) ("performance of an abortion upon [the minor] would be in her best interests"); S.C. Code Ann. § 44-41-33(A)(2) (Law. Co-op. Supp. 1995) ("performance of the abortion would be in the minor's best interest"); Tenn. Code Ann. § 37-10-304(e)(2) (1991) ("performance of the abortion would be in the minor's best interests"); Wis. Stat. Ann. § 48.375(7)(c)2 (West Supp. 1995) ("performance or inducement of the abortion is in the minor's best interests"); and Wyo. Stat. § 35-6-118(b)(v)(C) (Supp. 1995) ("[a]uthorize the abortion based upon a finding by clear and convincing evidence that the abortion is in the best interest of the minor"), *with* Ariz. Rev. Stat. Ann. § 36-2152.B (West 1996 Supp.) ("authorize a physician to perform the abortion without consent if the judge concludes that the pregnant minor's best interests would be served"); and Mich. Comp. Laws Ann. § 722.904(3)(b) (West 1993) ("[t]he waiver [of the parental consent requirement] would be in the best interests of the minor"); *see also* La. Rev. Stat. Ann. § 1299.35.5.B(6) (West Supp. 1996) (under judicial consent statute, court must determine whether "the abortion would be in the best interest of the minor").

that a minor's parent be notified and, to the extent notification is deemed in her best interests, that burden cannot be characterized as undue under the Fourteenth Amendment.[5]

The Court of Appeals' decision therefore blurs a core distinction between notice and consent statutes and casts doubt on the validity of parental notice statutes throughout the Nation. It does so without any substantive discussion of the underlying issue or even a modest effort to explain, in light of the statutes upheld in *Akron* and *Hodgson*, how the Montana best interests standard could constitute an undue burden on an immature minor's access to abortion. *Glick* itself is unhelpful in this regard, since it likewise failed to reconcile its holding with the

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[5] It warrants mention that nothing precludes a notice bypass decisionmaker from considering the appropriateness of the abortion when it determines whether parental notification should occur, any more than a parental consent bypass decisionmaker, as indicated in *Bellotti*, 443 U.S. at 648, is foreclosed from concluding that judicial consent to an abortion should not be given until parental consultation has taken place. Indeed, at least one State has codified this aspect of *Bellotti*. La. Rev. Stat. Ann. § 40:1299.35.5.B(5) (West Supp. 1996) (requiring court under judicial consent statute to notify parents of requested abortion if such notice deemed in the minor's best interest and to "reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor"). The critical difference between notice and consent statutes nonetheless remains since the notice bypass decisionmaker *must* authorize the abortion once it determines parental notification would not be in the minor's best interests, regardless of whether it believes an abortion is.

language of the statutes upheld in those cases.[6] The decision below represents, in short, an instance where an issue of national importance has been resolved without analysis of controlling opinions from this Court on the basis of a prior, quite flawed circuit court opinion.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE ELEVENTH CIRCUIT'S OPINION IN *MILLER*.

Review is appropriate, finally, because *Glick* and the decision below conflict with *Miller*. The statute in question there was a Georgia parental notice law virtually identical to Montana's, including its best interests provision that authorized waiver of the notice requirement if the notice was not in the minor's best interests. *Miller*, 934 F.2d at 1468 (citing Ga. Code Ann. § 15-11-114(c)(2)). The court of appeals noted that the issue whether a judicial waiver procedure was required under a parental notice statute arguably was unresolved but found it

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[6] The failure to recognize, or at least discuss, the similarity may have derived from the absence of any challenge by the *Glick* plaintiffs to the Nevada statute's best interests criterion. In their supplemental brief filed after *Hodgson* and *Akron* were decided, they distinguished the Minnesota and Ohio statutes from the Nevada law solely on procedural, confidentiality and expediency grounds. *See* Supp'l Br. Pls./Appellees at 4-9, *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (No. 85-2335). The Court accepted only the last of the plaintiffs' contentions. 937 F.2d at 440-42. The *Glick* plaintiffs also did not question the validity of the best interests criterion in their brief filed prior to the *Hodgson* and *Akron* decisions. *See* Br. Resp't at 31-40, *id.* The panel in *Glick* accordingly decided an issue not raised or briefed by the parties.

unnecessary to address the issue since the Georgia law satisfied *Bellotti* standards. *Id.* at 1476 n.21. The only *Bellotti* element the Georgia provision failed to meet "precisely," the court stated, was the requirement that the bypass decisionmaker determine whether the abortion was in the minor's best interests. That difference, however, was deemed "constitutionally [in]significant" because the Ohio statute sustained in *Akron* employed language indistinguishable from the Georgia best interests provision. *Id.* at 1477 n.21.

The court of appeals' analysis in *Miller* is correct, but for present purposes the more salient point is that its analysis is irreconcilable with the holding in *Glick* and the decision below. Although the issue over which the circuit courts disagree is narrow, it is critical in view of the formulation of the best interests provision in *every* parental notice statute with a judicial bypass procedure. Not resolving this conflict will serve only to foster confusion where none should exist.[7]

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[7] The District Court's reliance on *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996), warrants brief mention. The issue there was whether *any* bypass procedure is constitutionally required in a single-parent notice statute. *Id.* at 1458. Although recognizing the issue has not been resolved definitively by this Court, the court of appeals looked chiefly on *Hodgson* for the proposition that "States may generally require the parent's involvement in an immature minor's abortion decision because it is presumed that a parent will act in the minor's best interest" but that, "if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason requiring such notice." *Id.* at 1460. Section 50-20-212(5)(b), like best-interests provisions in other notice bypass statutes, embodies precisely the standard that *Sioux Falls Clinic* found mandated constitutionally. The Eighth Circuit's conclusion that "a *Bellotti*-bypass" process must be made available where notice to only one parent is required does not mean, as the District Court supposed, an undue burden arises by framing the best-interests inquiry as whether parental notice, rather than the abortion itself, is in the minor's best interests. It instead means merely that a bypass procedure comparable to those upheld in *Hodgson* and *Akron* must be included in a notice statute. Rather than supporting the District Court's determination, the Eighth Circuit's decision thus counsels against it. That said, *Sioux Falls Clinic* did not resolve directly the question presented here, since the South Dakota law contained no best interests provision and since the Petitioner has not contended that no bypass procedure is required constitutionally under a parental notice statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

JOSEPH P. MAZUREK
Attorney General of Montana
CLAY R. SMITH
Solicitor
Counsel of Record
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

November 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D., SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, and surrounding states and Canada, *Plaintiffs-Appellees,* *v.* MICHAEL SALVAGNI, *Defendant-Appellant.*	No. 95-36028 D.C. No. CV-93-00092-JFB OPINION

Appeal from the United States District Court
for the District of Montana
James F. Battin, District Judge, Presiding

Argued and Submitted
July 10, 1996 – Seattle, Washington

Filed August 16, 1996

Before: Thomas M. Reavley,* Stephen Reinhardt, Charles Wiggins, Circuit Judges.

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* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Opinion by Judge Reinhardt

COUNSEL

Clay R. Smith, Assistant Attorney General, Helena, Montana, for the defendant-appellant.

Simon Heller, Center for Reproductive Law and Policy, New York, New York, for the plaintiff-appellee.

OPINION

REINHARDT, Circuit Judge:

The issue in this case is whether a Montana statute that requires that minors notify a parent before obtaining an abortion is constitutional. The statute provides for a form of "judicial bypass" of its parental notification provision for certain minors. Plaintiffs filed an action in district court contending that the notification statute was unconstitutional because the bypass was inadequate. The district court found the statute unconstitutional. On appeal the parties explore a number of difficult issues. We do not reach them because we conclude that we are bound by our earlier decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), and therefore affirm.

Background and Procedural History

In November 1993, six physicians, a physician assistant, and an organization providing abortion services brought suit on behalf of Dr. Susan Wicklund as well as minors of Montana and neighboring states challenging Montana's Abortion Control Act, Mont. Code Ann.

§ 50-20-107(1)(b) (1993). The Act required minors to notify their parents before obtaining an abortion. It did not provide for a judicial or alternate bypass procedure through which a qualified minor could avoid giving notice in appropriate circumstances. In December 1993, the District Court issued an order permanently enjoining the enforcement of Mont. Code Ann. § 50-20-107(1)(b), based on a stipulation by the defendant that the provision was unconstitutional.

In direct response to that court order, the Montana Legislature repealed § 50-20-107 and passed a new parental notification law entitled the Parental Notice of Abortion Act (the Act). Mont. Code Ann. § 50-20-201 *et seq* (1995). That Act, which is now before us, prohibits a physician from performing an abortion upon a minor or an incompetent person unless that physician or a referring physician has given 48 hours actual notice to one parent or a legal guardian of the patient concerning the intent to perform the abortion. Mont. Code Ann. § 50-20-204. Notice need not be given under certain circumstances, including when it is waived judicially under Mont. Code Ann. § 50-20-208. Section 50-20-212's bypass provision states:

> **Procedures for judicial waiver of notice**
>
> (2) (a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf.
>
> (4) If the court finds by clear and convincing evi dence that the petitioner is sufficiently mature to decide whether to have an abortion,

> the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.
>
> (5) The court shall issue an order authorizing the petitioner to consent to an abortion without notification of a parent or guardian if the court finds by clear and convincing evidence, that:
>
> (b) *the notification of a parent or guardian is not in the best interests of the petitioner.*

Plaintiffs filed a motion for leave to file a supplemental complaint to challenge the constitutionality of the act, which the district court granted. The parties filed cross-motions for summary judgment, and the district court granted plaintiffs'. The district court determined that a minor who seeks to bypass parental notification and shows that *an abortion is in her best interests* must be able to obtain an abortion without notifying a parent or guardian. The County Attorney appeals.

Analysis

Over the last 15 years, the Supreme Court has examined the circumstances under which states may require parental *consent* before allowing a minor to procure an abortion. *E.g., Ohio v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*); *Planned Parenthood Association of Kansas v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979). Where a minor is insufficiently mature or emancipated to make the abortion decision for herself, the state may require such consent. *Bellotti*, 443 U.S. at 640 (plurality opinion). However, if the state does

so, the statute must also include a means by which "qualified" minors may circumvent the requirement. *Id.* at 643; *see also Akron I*, 462 U.S. at 439-40. That typically comes in the form of a "judicial bypass." A judicial bypass is designed to allow the minor the opportunity to persuade the court to allow her to have an abortion without having to notify a parent and obtain parental consent. Under *Bellotti*, a minor is entitled to avoid having to a bypass [sic] if she can show either:

> (1) that she is mature enough and well informed enough to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Bellotti, 443 U.S. at 643-44 (plurality opinion); *see also Akron II*, 497 U.S. at 511-13 (citing *Bellotti*). In addition, "[t]he proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 644.

The Supreme Court has left open the question of whether or not a judicial bypass to a parental notification provision (such as the one at issue here) is constitutionally required. The Court considered the constitutionality of a notification provision in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (*Akron II*), but avoided deciding whether a bypass was required. In *Akron II*, the Court first considered whether the notice

bypass of the Ohio statute met the test for a consent-bypass set forth in *Bellotti*:

> In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, H.B. 319's bypass procedure meets the requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*. [I]t is a corollary to the greater inclusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute.

Akron II, 497 U.S. at 510-11. Because the Court concluded that the notice-bypass provision satisfied the *Bellotti* standard, it did not reach the question whether a notice-bypass is constitutionally required, and if so, what form it must take.[1]

Appellees contend that the Montana statute is unconstitutional because it does not provide for a bypass as a matter of right to those minors who can show that *an abortion is in their best interests*. Justice Powell's opinion in *Bellotti*, 443 U.S. at 643, and subsequent cases make clear that where a minor can show that (1) she is sufficiently mature to make her own decision whether to have an abortion or (2) an abortion is in her best interests, state

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[1] The Supreme Court has suggested that an administrative as well as a judicial bypass might be valid under parental consent statutes. *Bellotti*, 443 U.S. at 643 n.22.

law must allow her to obtain that abortion without obtaining parental consent. *Akron II*, 497 U.S. at 510-11. Apparently in obedience to that dictate, the Montana statute allows mature minors to avoid parental notification. However, unlike in states with consent statutes, minors in Montana who can show that an abortion is in their best interests may nevertheless be compelled to comply with the parental notification requirement.

Appellees argue that if a minor is willing to go to court, undergo the emotional strain and practical difficulties of the judicial bypass procedure, and establish that it is in her best interests to have an abortion, her actions demonstrate that she is so afraid or unwilling to inform her parents that forcing her to do so would constitute an undue burden on her right to have an abortion. Appellees contend, therefore, that a minor who is unalterably opposed to letting her parents know of her condition, and her plans for an abortion, should be able to obtain a waiver of the parental notification requirement simply by showing that having an abortion is in her best interests. They argue that whatever the judge may think objectively of the wisdom of a minor's notifying her parents, the question is a highly subjective one, and if, in the end, the young woman is sufficiently distressed by the prospect of a hostile or abusive parental reaction that she is unwilling to notify them, then the notification requirement will necessarily constitute an undue burden. In short, the argument goes, if a young woman *in whose best interests it is to have an abortion* is too afraid or humiliated to tell her parent that she is pregnant, she must be able to avoid the notification requirement, whether or not a court concludes that it would be in her best interests to give the

statutorily mandated notice. Otherwise, say appellees, the minor may in effect be precluded from having the abortion that is in her best interests and that she fervently desires.[2]

Appellant vigorously disagrees. He contends that it is in fact *less* burdensome for a minor to demonstrate that notification is not in her best interests than it is for her to show that an abortion is. He also argues that appellees' concerns about the bypass provision's being linked to a minor's showing that notification is not in her best interests are misplaced because the judge conducting the bypass hearing may consider any argument the minor makes as to why an abortion is in her best interests in making his ultimate decision as to whether parental notification will be waived. Next, he points to the manifold benefits that flow from parental counseling, whether or not the minor desires it, and points out that no one is in a better position to give desperately needed advice to a young person at what is surely the most critical point in her life. Finally, appellant maintains that because in a notice statute, unlike in a consent statute, the ultimate decision as to whether to have an abortion, rests with the minor, it is appropriate that the judge consider whether notification rather than the abortion is in her best interests.

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[2] Appellees' arguments bring to mind the statement of Justice Kennard in her dissenting opinion in *American Academy of Pediatricians v. Lungren*, 51 Cal. Rptr. 201 (1996), *rehearing granted*, May 22, 1996. "Not every pregnant adolescent has parents out of the comforting and idyllic world of Norman Rockwell." *Id.* at 224 (Kennard, J., dissenting).

If we were considering this issue for the first time, we would be faced with a difficult constitutional problem; for there is considerable force to each side of the argument, and the Supreme Court has not made clear what the Constitution requires. However, *this court* has already spoken. In *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), we found unconstitutional a Nevada parental notification statute with a "best interests" bypass standard that was virtually identical to the one at issue here. The bypass provision of the Nevada statute provided that a minor seeking an abortion could bypass parental notification if she could show that "*the notice* . . . would be detrimental to her best interests." Nev. Rev. Stat. § 442.255(2)(c) (1995) (emphasis added). In *Glick*, we held that statute unconstitutional in part because the quoted provision "impermissibly constricted the meaning of 'best interests.' " 937 F.2d at 442.

In *Glick*, which was decided after *Akron II*, we first pointed out that Nevada's statute failed to allow the minor "to show that even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests." *Glick*, 937 F.2d at 438-39. We then said that the omission of such a provision contravened the requirements of *Bellotti*. *Id.* Specifically, we noted that Nevada's bypass procedure,"both at the initial judicial interview and at the petition hearing, allows the minor to show that *parental notification* would not be in her best interests, and requires the court to authorize the abortion in such instances." *Id.* at 438. We then stated, "[t]he language of these provisions does not meet the requirement of *Bellotti*. *Id.* at 439. Rather than requiring the reviewing court to

consider the minor's 'best interests' generally, the Nevada statute requires the consideration of 'best interests' only with respect to the possible consequences of parental notification." We continued, "[f]urthermore, in *Bellotti*, the court expressly stated, '[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization *without any parental involvement*.' " *Id.* (citing *Bellotti*, 443 U.S. at 648) (emphasis added). Then came the critical language. The *Glick* court concluded that "the Nevada statute impermissibly narrows the Bellotti 'best interests' criterion, and *is unconstitutional*." *Id.* (emphasis added).

While there is some ambiguity in *Glick*, we cannot escape the conclusion that a reason for its holding that the Nevada provision was unconstitutional was that the judicial officer was required to determine whether parental notification, rather than the proposed abortion, was in the minor's best interests. The ambiguity occurs because, after explicitly declaring that the best interests standard employed in the statute is *"unconstitutional," Glick* went on to say, "[b]ecause we hold that the Nevada bypass procedure does not meet the constitutional requirements of a consent statute, we must consider whether it meets the requirements of the less intrusive notification statute." *Glick*, 937 F.2d at 441 (citing *H.L. v. Matheson*, 450 U.S. 398, n.17 (1981)). Then, *Glick* proceeded to reexamine Nevada's bypass procedure. It is this reexamination that appellant contends permits us to avoid the holding that Nevada's best interests provision was unconstitutional. Unfortunately for appellant, however, our reexamination did not change our conclusion.

While we would be reluctant in any event to disregard a flat determination by our court that a statutory provision is "unconstitutional," we certainly cannot disregard such a determination in this case. For in *Glick* we stated our conclusion not once, but twice. Toward the end of *Glick* we stated for the second time that the Nevada bypass mechanism was constitutionally inadequate. 937 F.2d at 442. The second time we did so in the section in which we reexamined the adequacy of the bypass provision. After carefully conducting that reexamination, we stated, in connection with our discussion of another constitutional flaw in the provision:[3] "that Nevada has *impermissibly constricted* the meaning of 'best interests' only adds to the infirmity." *Glick*, 937 F.2d at 442 (emphasis added). There can be no doubt after that second declaration of constitutional impermissibility that *Glick* stands for the proposition that the type of best interests bypass provision set forth in the Nevada statute cannot pass constitutional muster. Because the best interests bypass provision of the Montana statute is, for all practical purposes, identical to the Nevada provision, it cannot either.

Appellant contends that we should "overrule" *Glick* because it is inconsistent with the Supreme Court's decision in *Akron II*. We disagree. Even if we thought Glick were incorrect, as a panel of this court we would not be free to overrule it. *Glick* was issued subsequent to *Akron*

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[3] The flaw that we considered principally in the latter part of *Glick*, was the failure of the statute to guarantee an expedient resolution of the bypass proceeding because it did not set time limits within which the judge was required to rule on the minor's petition. 937 F.2d at 440-41.

II; in fact, the *Glick* court vacated submission of the case to await the Supreme Court decision in *Akron II*. It was not only aware of that opinion, it considered it and relied on it in reaching its conclusion. We are therefore not free simply to disregard *Glick*. Accordingly, we must uphold the district court's determination that the Montana bypass provision is unconstitutional.

We need not reach appellees' other argument, which the district court also did not consider, that Montana's statute fails adequately to protect the anonymity of minors who petition for notice bypass. Because Montana's statute does not meet the best interests requirement set forth in *Glick v. McKay*, the district court order granting appellees' motion for summary judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

SUSAN WICKLUND, M.D., et al., Plaintiffs, v. MICHAEL SALVAGNI, in his individual capacity and in his official capacity as Gallatin County Attorney, Defendant.	No. CV 93-92-BU-JFB MEMORANDUM AND ORDER

(Filed Sep. 27, 1995)

Pending before the Court are cross-motions for Summary Judgment by Plaintiffs and Defendant. To expedite the decision, and with the parties' concurrence, the matters raised are deemed submitted without the need for oral argument. After considering the briefs and supporting documents submitted, the Court rules as follows.

This action was originally filed on November 23, 1993. The Plaintiffs sought an order enjoining Defendant from enforcing Mont. Code Ann. § 50-20-107(1)(b), which required parental notification before an abortion could be performed on a minor. This Court entered a Temporary Restraining Order on November 30, 1993, enjoining Defendant from enforcing Mont. Code Ann. § 50-20-107(1)(b). The Temporary Restraining Order

remained in effect until the Court entered a final judgment on December 21, 1993. The Judgment, based on the parties' stipulation, permanently enjoined enforcement of Mont. Code Ann. § 50-20-107(1)(b) because it was unconstitutional. On July 17, 1995, this Court granted Plaintiffs' Motion for Leave to File a Supplemental Complaint. Plaintiffs are currently contesting the constitutionality of HB 482, a new parental notification provision that was signed into law by Montana Governor Marc Racicot on April 15, 1995.[1] The law is scheduled to go into effect on October 1, 1995.

The Plaintiffs and Defendant agree that it is a matter of law to be decided by the Court as to whether HB 482 is constitutional. The law at issue requires parental notice for unemancipated minors and incompetent persons seeking abortions. HB 482, § 4.[2] An "emancipated minor" is defined as "a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-3-406." HB 482 § 3(3). Section 9 provides for judicial waiver of

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[1] The law is entitled "AN ACT REQUIRING PARENTAL NOTIFICATION PRIOR TO AN ABORTION FOR A MINOR OR INCOMPETENT PERSON; PROVIDING A JUDICIAL WAIVER OF NOTIFICATION; PROVIDING PENALTIES; AMENDING SECTION 41-1-405, MONT. CODE ANN.; AND REPEALING SECTION 50-20-107, MONT. CODE. ANN." A copy of the law is attached as an Appendix to this ruling.

[2] Section 4 provides: **Notice of parent required.** A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion.

the notice requirement and is at the heart of the motions presently pending. Section 9 provides that a minor "may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf." The petition may be granted by the youth court and the notice requirement waived pursuant to four different alternatives. These include:

(1) "If the court fails to rule within 48 hours and the time is not extended." § 9(3).

(2) If the court finds that petitioner is "sufficiently mature to decide whether to have an abortion." § 9(4).

(3) If the court finds that "there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian." § 9(5)(a).

(4) If the Court finds that "the notification of a parent or guardian is not in the best interests of the petitioner." § 9(5)(b).

Plaintiffs claim that Section 9 of HB 482 is unconstitutional, for four reasons.[3] First, because a minor must

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[3] The Plaintiffs assert in a footnote that HB 482 is also invalid because section 7, which provides that "public assistance benefits may not be used [by an emancipated minor] to obtain an abortion," violates Title XIX and the Hyde Amendment. *See,* Pls' Br. In Supp. of Pls' Mot. for Summ. J., p.6 n.3 (citing *Planned Parenthood of Missoula Inc. v. Blouke,* 858 F.Supp. 137 (D. Mont. 1994)). The Court will not address this issue because it was not properly raised and briefed. Plaintiff also initially challenged the lack of an expedited appeals procedure for the judicial bypass proceedings. However, in the

petition the youth court for a waiver of notice, the Plaintiffs argue that Mont. Code. Ann. § 41-5-502(1), which requires service of a summons on a petitioner's parents after a petition is filed in youth court, effectively notifies the minor's parents of the judicial waiver procedure.[4] Second, Plaintiffs argue that the provision allowing for waiver if notification of the parents would not be in the best interests of the petitioner, improperly narrows the consideration of what is in the minor's overall "best interests." *Glick v. McKay*, 937 F.2d 434, 438 (9th Cir. 1991). Third, Plaintiffs argue that if the minor seeks a waiver of notification based on abuse, constructive notice to the minor's parents will occur because the youth court will initiate an investigation of the home pursuant to Mont. Code Ann. § 41-3-202. Finally, Plaintiffs argue that the statute violates the Equal Protection Clause of the U.S. Constitution. Defendant has moved for summary judgment on the first, third and fourth claims. Plaintiffs have filed a cross-motion for summary judgment on the first, second and third grounds. Because the Court decides the motions in favor of Plaintiffs on the basis of the second ground, concerning the scope of the "best interests" inquiry, it will not address the remaining grounds for summary judgment asserted by either party.

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interim the Montana Supreme Court has adopted such a procedure and Plaintiffs' challenge to the adequacy of the bypass provision on that basis is therefore moot.

[4] **Mont. Code Ann. § 41-5-502. Summons.** (1) After a petition has been filed, summons must be served directly to: (a) the youth; (b) his parent or parents having actual custody of the youth or his guardian or custodian, as the case may be; and (c) other person as the court may direct.

A. Best Interests Inquiry

One ground for summary judgment raised by Plaintiffs concerns the scope of the "best interests" inquiry to be conducted by the youth court, in determining whether judicial bypass of the notice requirement is appropriate. The United States Supreme Court has stated that in judicial bypass proceedings in the context of a parental consent statute,

> A pregnant minor is entitled to show the court either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Bellotti v. Baird, 443 U.S. 622, 640-642 (1979); *see also Ohio v. Akron Center for Reproductive Health* ("*Akron II*"). 497 U.S. 502, 511 (1990). It is also well established that because of the greater intrusiveness of parental consent requirements, a notice-bypass provision that meets the requirements of a consent-bypass provision passes constitutional muster. *Akron II*, 497 U.S. at 511. Plaintiffs do not contend that the Montana parental notification statute does not meet the first requirement, and the Court specifically finds that it does. However, the "best interests" inquiry under *Bellotti* requires that in judicial bypass proceedings, a minor be given a chance to show that the **abortion** would be in her best interests. This is noticeably different than the inquiry under the Montana statute, which waives notification only if the Court first finds that **notification** would not be in the minor's best interests.

The Eleventh Circuit Court of Appeals has noted the distinction between these two standards, but did not believe that the difference was "constitutionally significant." *See Planned Parenthood Ass'n of Atlanta v. Miller*, 934 F.2d 1462, 1477 n.21 (11th Cir. 1991). However, the Ninth Circuit Court of Appeals, which controls this Court's decisionmaking, has a different view.

In *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), the Ninth Circuit Court of Appeals applied the *Bellotti* standards for a parental consent judicial bypass statute to a notification statute, and found that it did not pass constitutional muster because the statute required an inquiry into whether notification, not abortion, was in the minor's best interests. *Id.* at 439. The *Glick* Court quoted *Bellotti*, stating that

> "[i]f, *all things considered*, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." *Bellotti*, 443 U.S. at 648, 99 S.Ct. at 3050 (emphasis added). Therefore, the Nevada statute impermissibly narrows the *Bellotti* "best interests" criterion, and is unconstitutional.

Id. However, the *Glick* Court did not expressly hold that parental consent bypass standards apply in a notice context; instead, the statute was found unconstitutional on other grounds and the *Bellotti* problem "only [added] to the infirmity." *Id.* at 442.

In the context of a parental **consent** statute, the Court would have no problem applying *Glick* to determine that a judicial bypass provision focusing the "best interests" inquiry upon the narrow issue of notification, rather than

the broader issue of whether an abortion is in the minor's best interests, is unconstitutional. However, the present case involves a parental **notification** statute, not a parental consent statute. Neither the U. S. Supreme Court nor the Ninth Circuit Court of Appeals have expressly decided what, if any, are the requirements of a judicial bypass procedure in a parental notice, as opposed to a parental consent, statute. This Court looks to other circuits for guidance on the issue.

The Eighth Circuit Court of Appeals has addressed the same issue, and is the only one to have done so in a fairly thorough manner. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, ___ F.3d ___, 1995 WL 513959 (8th Cir. (S.D. 1995)). In *Miller*, the court began by noting that "the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests." *Id.*, 1995 WL 513959 at *5 (citing *H.L. v. Matheson*, 450 U.S. 398, 409 (1981)). However, "the Supreme Court has yet to decide whether a mature or "best interest" minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." *Id.* To resolve that issue, the Eighth Circuit considered the reasons why "requiring parental notice – or, for that matter parental consent – is not an undue burden upon immature minors who cannot show that an abortion would be in their best interests." *Id.* The answer, in the view of the Eighth Circuit, "is that they are minors, and States may impose requirements on immature minors that it may not impose on adults." *Id.* at *6 (citations omitted).

When dealing with a mature minor, the state's attempt to give parents power over the abortion decision

is on a collision course with the Constitution. *Id.* (citing *Bellotti*, 443 U.S. at 643-44 & n. 23). "By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women." *Id.*

In the case of an immature minor whose best interests would be served by having an abortion, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." *Id.* (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 454 (1990)). "But if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason for requiring such notice." *Miller*, 1995 WL 513959 at *5.

> For both mature and "best interest" minors, then, the State has no legitimate interest in imposing a parental notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek previability abortions. **For this reason, we hold that the State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and "best interest" minors can avoid it. In short, parental notice provisions, like parental-consent provisions, are unconstitutional without a "Bellotti-type bypass."**

Id. (emphasis added).

This Court agrees with the thoughtful reasoning of the Eighth Circuit, and further believes that the Ninth

Circuit, having held in *Glick* that a notice-bypass provision must meet constitutional scrutiny, *see Glick*, 937 F.2d at 442, would also apply the *Bellotti* standards to determine the scope of the "best interests" inquiry required. *See also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd* 484 U.S. 171 (1988), (parental notice statute could only withstand constitutional scrutiny if it provided a bypass procedure consistent with *Bellotti II*) (citing *Indiana Planned Parenthood Affiliates Ass'n. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983)). After all, the failure of the Nevada statute to meet the *Bellotti* standards was one of the two reasons given for holding the parental notice statute unconstitutional. *Glick*, 937 F.2d at 442. Under *Bellotti* and *Glick*,[5] a minor must have an opportunity to show not just that notification is not in her best interests, but that having an abortion **is** in her best interests. The Montana judicial bypass statute does not conform with the *Bellotti* standards, impermissibly narrows the scope of the "best interests" inquiry, and places an undue burden upon the right of a minor who is able to show that abortion is in her best interests, to obtain an abortion without parental involvement. It is therefore unconstitutional.

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[5] Defendant argues that *Glick* is no longer good law, after *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992). However, nothing in *Casey* alters the Court's reasoning above. To the contrary, *Casey* reaffirms that the State may not unduly burden a minor's access to abortion. *Casey*, 112 S.Ct. at 2821. As noted above, the imposition of a notification requirement, without an adequate *Bellotti-type* bypass provision, would constitute an undue burden upon the right of a mature or "best interest" minor to have an abortion.

B. Arnott's Renewed Motion to Intervene

Finally, there is a "Renewed Motion to Intervene as Defendant by Representative Arnott." This Motion was filed on September 14, 1995, three days after the Court denied Representative Arnott's original Motion to Intervene. Representative Arnott argues that she should have the opportunity to intervene because her interests are not adequately represented by the Attorney General. She bases this argument on the fact that the Attorney General has not filed a motion to sever Section 12 of HB 482, from the rest of the bill.[6] However, the Defendant has stated that section 12 is severable and that the motions at issue only address the constitutionality of sections 1-10 of HB 482. *See* Com. Rep. Br. in Supp. of Def's Mot. for Summ. J., p.16 n.5. The Court concludes that this is not a proper basis for Arnott to intervene and further concludes that any potential interests of Arnott are, as previously stated in the Memorandum and Order of September 11, 1995, adequately represented. Wherefore,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied. Sections 1 through 10 of Montana HB 482 are hereby declared unconstitutional, and Defendant is permanently enjoined from enforcing those sections.

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[6] Section 12 provides: RIGHT OF INTERVENTION. PURSUANT TO RULE 24(A), MONTANA RULES OF CIVIL PROCEDURE, A LEGISLATOR HAS THE RIGHT TO INTERVENE IN ANY CASE IN WHICH THE LEGALITY OF TITLE 50, CHAPTER 20, IS CHALLENGED.

IT IS FURTHER ORDERED that the Representative Arnott's Renewed Motion to Intervene is denied.

The Clerk is directed to enter Judgment accordingly and notify counsel of record and Mr. Timothy J. Whalen of this Order.

DONE AND DATED this 27th day of September, 1995.

/s/ James F. Battin
Senior U.S. District Judge

HOUSE BILL NO. 482

REFERENCE BILL
AS AMENDED

INTRODUCED BY GRIMES, MARTINEZ, ESTRADA, BAER, HARGROVE, WELLS, MCGEE, MILLER, REHBEIN, SOFT, BRAINARD, GREEN, SIMPKINS, STOVALL, TASH, MASOLO, MOHL, FOSTER, COLE, HAYNE, BENEDICT, PECK, HERRON, FORBES, MARSHALL, KNOX, DEVANEY, DEVLIN, GROSFIELD, BROWN, MCCANN, ZOOK, HARDING, VICK, ORR, L. SMITH, BERGMAN, TVEIT, ANDERSON, KEATING, KASTEN, MOLNAR, AHNER, HERTEL, MERCER, CURTISS, EMERSON

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING PARENTAL NOTIFICATION PRIOR TO AN ABORTION FOR A MINOR OR INCOMPETENT PERSON; PROVIDING A JUDICIAL WAIVER OF NOTIFICATION; PROVIDING PENALTIES; AMENDING SECTION 41-1-405, MCA; AND REPEALING SECTION 50-20-107, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 10] may be cited as the "Parental Notice of Abortion Act".

NEW SECTION. **Section 2. Legislative purpose and findings.** (1) The legislature finds that:

(a) immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences;

(b) the medical, emotional, and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature;

(c) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;

(d) parents ordinarily possess information essential to a physician in the exercise of the physician's best medical judgment concerning the minor;

(e) parents who are aware that their minor daughter has had an abortion may better ensure that the daughter receives adequate medical care after the abortion; and

(f) parental consultation is usually desirable and in the best interests of the minor.

(2) The purpose of [section 1 through 10] is to further the important and compelling state interests of:

(a) protecting minors against their own immaturity;

(b) fostering family unity and preserving the family as a viable social unit;

(c) protecting the constitutional rights of parents to rear children who are members of their household; and

(d) reducing teenage pregnancy and unnecessary abortion.

NEW SECTION. **Section 3. Definitions.** As used in [section 1 through 10] unless the context requires otherwise, the following definitions apply:

(1) "Actual notice" means the giving of notice directly in person or by telephone.

(2) "Coercion" means restraining or dominating the choice of a minor female by force, threat of force, or deprivation of food and shelter.

(3) "Emancipated minor" means a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-3-406.

(4) "Incompetent person" means a person who is an incapacitated person or a protected person who has had a guardian appointed pursuant to Title 72, chapter 5.

(5) "Medical emergency" means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of the woman's pregnancy to avert the woman's death or a condition for which a delay in treatment will create serious risk of substantial and irreversible impairment of a major bodily function.

(6) "MINOR" MEANS A ~~MALE OR~~ FEMALE UNDER 18 YEARS OF AGE WHO IS NOT AN EMANCIPATED MINOR.

~~(6)~~(7) "Physical abuse" means any physical injury intentionally inflicted by a parent or legal guardian on a child.

~~(7)~~(8) "Physician" means a person licensed to practice medicine under Title 37, chapter 3.

~~(8)~~(9) "Sexual abuse" has the meaning given 41-3-102.

NEW SECTION. **Section 4. Notice of parent required.** A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion. The actual notice may be given by a referring physician. The physician who performs the abortion must receive the written statement of the referring physician certifying that the referring physician has given actual notice. If actual notice is not possible after a reasonable effort, the physician or the physician's agent shall give alternate notice as provided in [section 5].

NEW SECTION. **Section 5. Alternate notification.** In lieu of the actual notice required by [section 4], notice may be made by certified mail addressed to the parent at the usual place of residence of the parent with return receipt requested and delivery restricted to the addressee, which means a postal employee may deliver the mail only to the authorized addressee. Time of delivery is

considered to occur at noon on the next day on which regular mail delivery takes place after mailing.

NEW SECTION. **Section 6. Exceptions.** Notice is not required under [section 4 or 5] if:

(1) the attending physicians certifies in the patient's medical record that a medical emergency exists and there is insufficient time to provide notice;

(2) notice is waived, in writing, by the person entitled to notice; or

(3) notice is waived under [section 9].

NEW SECTION. **Section 7. Coercion prohibited.** A parent, a guardian, or any other person may not coerce a minor to have an abortion. If a minor is denied financial support by the minor's parents, guardian, or custodian because of the minor's refusal to have an abortion, the minor must be considered an emancipated minor for the purposes of eligibility for public assistance benefits. The public assistance benefits may not be used to obtain an abortion.

NEW SECTION. **Section 8. Reports.** A monthly report indicating the number of notices issued under [sections 1 through 10] and the number of times in which exceptions were made to the notice requirement under [section 6], as well as the type of exceptions, must be filed with the department of health and environmental sciences on forms prescribed by the department. Patient names AND OTHER IDENTIFYING INFORMATION may not be used on the forms. The department shall prepare and made available to the public on an annual basis a compilation of the data reported.

NEW SECTION. **Section 9. Procedure for judicial waiver of notice.** (1) The requirements and procedures under this section are available to minors and incompetent persons whether or not they are residents of this state.

(2)(a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf. The petition must include a statement that the petitioner is pregnant and is not emancipated. The court may appoint a guardian ad litem for the petitioner. A guardian ad litem is required to maintain the confidentiality of the proceedings. The youth court shall advise the petitioner of the right to court-appointed counsel and shall provide the petitioner with counsel upon request.

(b) If the petition filed under subsection (2)(a) alleges abuse as a basis for waiver of notice, the youth court shall treat the petition as a report under 41-3-202. The provisions of Title 41, chapter 3, part 2, apply to an investigation conducted pursuant to this subsection.

(3) Proceedings under this section are confidential and must ensure the anonymity of the petitioner. All proceedings under this section must be sealed. The petitioner may file the petition using a pseudonym or using the petitioner's initials. All documents related to the petition are confidential and are not available to the public. The proceedings on the petition must be given preference over other pending matters to the extent necessary to ensure that the court reaches a prompt decision. The court shall issue written findings of fact and conclusions

of law and rule within 48 hours of the time that the petition is filed unless the time is extended at the request of the petitioner. If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the notice requirement is waived.

(4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.

(5) The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that:

(a) there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian; or

(b) the notification of a parent or guardian is not in the best interests of the petitioner.

(6) If the court does not make a finding specified in subsection (4) or (5), the court shall dismiss the petition.

(7) A court that conducts proceedings under this section shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained.

(8) The supreme court may adopt rules providing an expedited confidential appeal by a petitioner if the

youth court denies a petition. An order authorizing an abortion without notice is not subject to appeal.

(9) Filing fees may not be required of a pregnant minor who petitions a court for a waiver of parental notification or appeals a denial of a petition.

NEW SECTION. **Section 10. Criminal and civil penalties.** (1) A person convicted of performing an abortion in violation of [section 4 or 5] shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(2) Failure to provide the notice required under [section 4 or 5] is prima facie evidence in an appropriate civil action for a violation of a professional obligation. The evidence does not apply to issues other than failure to notify the parents or guardian. A civil action may be based on a claim that the failure to notify was the result of a violation of the appropriate legal standard of care. Failure to provide notice is presumed to be actual malice pursuant to the provisions of 27-1-221. [Sections 1 through 10] do not limit the common-law rights of parents.

(3) A person who coerces a minor to have an abortion is guilty of a misdemeanor and upon conviction shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. On a second or subsequent conviction, the person shall be fined an amount not less than $500 and not more than $50,000 and be imprisoned in the state prison for a term not less than 10 days and not more than 5 years, or both.

(4) A person not authorized to receive notice under [section 5] who signs a notice of waiver as provided in [section 6(2)] is guilty of a misdemeanor.

Section 11. Section 41-1-405, MCA, is amended to read:

"**41-1-405. Emergencies and special situations.** (1) ~~Any~~ A health professional may render or attempt to render emergency service or first aid, medical, surgical, dental, or psychiatric treatment, without compensation, to any injured person or any person regardless of age who is in need of immediate health care when, in good faith, the professional believes that the giving of aid is the only alternative to probable death or serious physical or mental damage.

(2) ~~Any~~ A health professional may render non-emergency services to minors for conditions ~~which~~ that will endanger the health or life of the minor if services would be delayed by obtaining consent from spouse, parent, parents, or legal guardian.

(3) ~~No consent shall~~ Consent may not be required of ~~any~~ a minor who does not possess the mental capacity or who has a physical disability ~~which~~ that renders ~~him~~ the minor incapable of giving ~~his~~ consent and who has no known relatives or legal guardians, if a physician determines that the health service should be given.

(4) Self-consent of minors ~~shall~~ does not apply to sterilization or abortion, except as provided in [sections 1 through 10]."

~~NEW SECTION. Section 12. Right of intervention. Pursuant to Rule 24(a), Montana Rules of Civil Procedure,~~

~~a legislator has the right to intervene in any case in which the constitutionality of Title 50, chapter 20, is challenged.~~

NEW SECTION. **SECTION 12. RIGHT OF INTERVENTION.** PURSUANT TO RULE 24(A), MONTANA RULES OF CIVIL PROCEDURE, A LEGISLATOR HAS THE RIGHT TO INTERVENE IN ANY CASE IN WHICH THE LEGALITY OF TITLE 50, CHAPTER 20, IS CHALLENGED.

NEW SECTION. **Section 13. Repealer.** Section 50-20-107, MCA, is repealed.

NEW SECTION. **Section 14. Codification instruction.** [Sections 1 through 10] are intended to be codified as an integral part of Title 50, chapter 20, and the provisions of Title 50, chapter 20, apply to [sections 1 through 10].

NEW SECTION. **Section 15. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

- END -

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D., SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, and surrounding states and Canada, Plaintiff-Appellees, v. MICHAEL SALVAGNI, Defendant-Appellant.	No. 95-36028 D.C. No. 93-92-BU-JFB **ORDER** (Filed Oct. 24, 1996)

Before: REAVLEY,* REINHARDT, WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Wiggins have voted to reject the suggestion for rehearing en banc and Judge Reavley so recommends.

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* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT

DISTRICT OF *MONTANA – Butte Division*

SUSAN WICKLUND, M.D., et al

Plaintiffs

V.

MICHAEL SALVAGNI, In his indiv. capacity and in his official capacity as Gallatin County Attorney,

Defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: *CV 93-92-BU-JFB*

[ ] **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

[xx] **Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED

THAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS GRANTED AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED. SECTIONS 1 THROUGH 10 OF MONTANA HB 482 ARE HEREBY DECLARED UNCONSTITUTIONAL, AND DEFENDANT IS PERMANENTLY ENJOINED FROM ENFORCING THOSE SECTIONS. FURTHER ORDERED THAT THE REPRESENTATIVE ARNOTT'S RENEWED MOTION TO INTERVENE IS DENIED.

(copy of Memorandum, Opinion & ORDER of Judge Battin is attached)

SEP 27 1995 /s/ LOU ALEKSICH, JR.
Date (COURT SEAL) *Clerk*

/s/ Susan L. Nyho
(By) Deputy Clerk

Eugene GLICK, M.D., and Planned Parenthood of Washoe County,
Plaintiffs-Appellees,

v.

Brian MCKAY, Attorney General of the State of Nevada, et al., Defendants-Appellants.

No. 85-2335.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 13, 1986.
Submission Vacated April 15, 1986.

Resubmitted June 19, 1986.

Submission Vacated March 9, 1987.

Resubmitted June 20, 1991.

Decided June 21, 1991.

Ellen F. Whittemore, Deputy Atty. Gen., Las Vegas, Nev., for defendants-appellants.

Stanley H. Brown, Jr., Stanley H. Brown, Chartered, Reno, Nev., for plaintiffs-appellees.

Appeal from the United States District Court for the District of Nevada.

Before GOODWIN and BRUNETTI, Circuit Judges, and STOTLER*, District Judge.

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* Honorable Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

BRUNETTI, Circuit Judge:

Plaintiffs-appellees Dr. Eugene Glick, a physician, and Planned Parenthood of Washoe County, a non-profit family planning clinic, challenged the constitutionality of Nevada Revised Statute (NRS) 442.253(1)(c), which requires that an attending physician performing an abortion explain the physical and emotional implications of having an abortion to the woman; NRS 442.255, which requires parental notification or court authorization before a physician may perform an abortion upon an unemancipated minor; NRS 442.2555, which provides an appeal procedure when such court authorization has been denied; and NRS 442.257, which provides for criminal penalties for the violation of NRS 442.253(1)(c) and NRS 442.255. Appellees sought declaratory and injunctive relief pursuant to the Constitution and 42 U.S.C. § 1983. Defendants-appellants are the Attorney General of the State of Nevada and Nevada's seventeen District Attorneys, the state and local officials charged with enforcing the challenged statute.

On motion for preliminary injunction, the district court held that the explanation requirement was constitutional, but that the parental notification requirement (NRS 442.255), the appeal procedure (NRS 442.2555), and the criminal penalty provision (NRS 442.257) would be preliminarily enjoined. *Glick v. McKay*, 616 F.Supp. 322 (D.Nev.1985). Defendants appeal the court's preliminary injunction order. After briefing and argument, we withheld judgment pending the decision of the United States Supreme Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), *Hartigan v. Zbaraz*, 484 U.S. 171, 108 S.Ct. 479, 98 L.Ed.2d 478 (1987), *Hodgson v. Minnesota*, ___ U.S. ___, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), and *Ohio v. Akron Center for Reproductive Health*, ___ U.S. ___, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (*Akron II*), which had been accepted for review. We now affirm.

I.

A district court's order regarding preliminary injunctive relief is subject to limited review. The grant of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309 (9th Cir.1989). However, the interpretation of a statute is a question of law that we review de novo. *See, e.g., IMEL v. Laborer's Pension Trust Fund for No. Calif.*, 904 F.2d 1327, 1330 (9th Cir.1990). This is true, as well, for questions of law underlying the issuance of a preliminary injunction. *Guam Fresh, Inc. v. A.D.A.*, 849 F.2d 436, 437 (9th Cir.1988). Accordingly, although this appeal arises from a ruling on a motion for a preliminary injunction, important constitutional issues are at stake and the customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law. *See Thornburgh*, 476 U.S. at 757, 106 S.Ct. at 2177 ("if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction").

II.

Appellants first argue that because the Nevada parental notification requirement does not permit parents to veto their minor daughter's decision to have an abortion, unlike a consent requirement, the threat of an absolute veto is arguably absent. Therefore, they contend that a judicial or other procedure for bypassing the parental notification requirement is not constitutionally required.

In *Akron II* the Supreme Court specifically left this question open, as it found that the Ohio parental notification statute at issue satisfied the requirements identified for parental consent statutes in *Planned Parenthood Association of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion), *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (*Akron I*). *See Akron II*, 110 S.Ct. at 2979. Though we hold *infra* that the Nevada statute does not similarly satisfy the requirements for a parental consent statute, we need not address whether such a judicial or other bypass procedure is constitutionally required.

Appellees attack only the adequacy of the judicial bypass, not the lack of it. Because the Nevada parental notification statute contains a bypass procedure, we must address the constitutional adequacy of the procedure, but we are constrained from addressing the constitutional necessity of such a procedure.

III.

The Nevada parental notification statute specifically provides a bypass procedure. *See* NRS 442.255 and 442.2555. Appellants argue that this procedure is constitutionally sufficient.

In *Akron II* the Supreme Court held that a bypass procedure that would suffice as a consent statute will suffice as a notice statute. *Akron II*, 110 S.Ct. at 2979. The Court found that the Ohio parental notification statute at issue was constitutional, as it satisfied the four consent statute criteria established in *Bellotti*. *Id.* at 2979-81. We first consider whether the Nevada bypass procedure satisfies the *Bellotti* criteria.

The four *Bellotti* criteria applied in *Akron II* are:

1. The procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes;

2. the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests;

3. the procedure must ensure the minor's anonymity; and

4. the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain the abortion.

Id. 110 S.Ct. at 2979-80 (citing *Bellotti*, 443 U.S. at 643-44, 99 S.Ct. at 3048).

A.

The Nevada parental notification statute[1] provides a multi-tiered judicial bypass procedure. The minor must originally request a state district court to issue an order authorizing the abortion. NRS 442.255(2). The court then must interview the minor within two judicial days. *Id.*[2] If the court determines at the interview, from any information provided by the minor and any other evidence that the court may require, that either (1) the minor is mature enough to make an intelligent and informed decision concerning the abortion, (2) the minor is emancipated, or (3) parental notification would be detrimental to her best interests, the court must issue an order within one judicial day following the interview authorizing a physician to perform the abortion. *Id.* If the court does not find sufficient grounds to justify authorization, it must issue an order denying authorization within one judicial day

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[1] NRS 442.255 and 442.2555 are reproduced in the appendix following this opinion.

[2] Appellees argue that the statute is constitutionally deficient because it fails to set forth a specific procedure for a minor to arrange a judicial interview. Such a specific procedure is not constitutionally required. Under *Akron II*, a minor must be afforded only the *opportunity* to prove her case: "Even on the assumption that the . . . pleading scheme could produce some initial confusion . . . the simple and straightforward procedure does not deprive the minor of an opportunity to prove her case." *Akron II*, 110 S.Ct. at 2982 (discussing Ohio's formalized pleading requirements). The Nevada bypass procedure provides such an opportunity to a minor, both at the judicial interview and at the petition hearing. *See* NRS 442.255(2), 442.2555(3).

after the interview; if no order is issued within one judicial day, authorization is deemed granted. NRS 442.255(3).[3] Throughout these proceedings, the court must take the necessary steps to ensure confidentiality. NRS 442.255(4).

If the district court denies authorization pursuant to NRS 442.255(3), the minor, with appointed counsel if necessary, may file a petition in the state district court for a hearing. NRS 442.2555(1). The petition must set forth the minor's initials, her age, the elapsed number of weeks since probable conception, and whether maturity, emancipation, notification detrimental to the minor's best interests, or a combination thereof is relied upon in requesting authorization. NRS 442.2555(2). The court must hold a hearing on the merits of the petition within five judicial days after its filing. NRS 442.2555(3). At the hearing, the court will hear evidence relating to the minor's emotional development, maturity, intellect, understanding, degree of financial independence and emancipation from parental authority, best interests relative to parental involvement in the decision whether to have an abortion, and any other evidence the court finds useful. *Id.* The court

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[3] Appellees challenge this "constructive authorization" provision. However, in *Akron II* the Supreme Court specifically ruled that such a provision did not violate the Constitution: "Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements. . . . With an abundance of caution, and concern for the minor's interests, [the state] added the constructive authorization provision . . . to ensure expedition of the bypass procedures even if those time limits are not met." *Akron II*, 110 S.Ct. at 2981.

then enters a decree either granting the petition to authorize a physician to perform an abortion without parental notification, or denying the petition, setting forth the grounds for denial. NRS 442.2555(4). The statute imposes no deadline for issuing this decree. Throughout these proceedings the court must take necessary steps to ensure confidentiality. NRS 442.255(4).

Finally, if the petition is denied, the minor may appeal the denial to the Nevada Supreme Court. NRS 442.2555(5). The notice of intent to appeal must be made within one judicial day and the record on appeal must be perfected within five judicial days after the filing of the notice. *Id.* The statute requires that the Nevada Supreme Court, by rule or order, provide for a confidential and expedited review of the case. *Id.* On April 30, 1991, the Nevada Supreme Court filed an order which states:

> Pursuant to the legislative directive set forth in NRS 442.2555(5); IT IS HEREBY ORDERED that any appeals taken pursuant to NRS 442.2555(5) shall be confidential and submitted to the court for expedited review.

B.

1.

A judicial bypass procedure first must allow the minor "to show that she possesses the maturity and information to make the abortion decision, in consultation with her physician, without regard to her parents' wishes." *Akron II*, 110 S.Ct. at 2979 (citing *Bellotti*, 443 U.S. at 643, 99 S.Ct. at 3048). In *Akron II* the Court held that the Ohio parental notification statute satisfied this criterion,

as it specifically permitted the minor to show that she " 'is sufficiently mature and well enough informed to decide intelligently whether to have an abortion.' " *Id.* (quoting Ohio Rev. Code Ann. § 2151.85(C)(1) (Supp.1988)).

The Nevada bypass procedure, both at the initial judicial interview and at the petition hearing, also specifically allows the minor to show her maturity and informed status. *See* NRS 442.255(2)(a) (at the interview, if, from information provided by minor, the court determines that "[s]he is mature enough to make an intelligent and informed decision concerning the abortion," the court shall authorize a physician to perform the abortion); NRS 442.2555(3)(a) (at the hearing the court shall hear evidence relating to "[t]he minor's emotional development, maturity, intellect and understanding"). Under *Akron II*, the Nevada statute meets the first *Bellotti* criterion.

2.

Second, a bypass procedure must allow the minor to show that even if she cannot make the decision herself, the desired abortion would be in her best interests. *Akron II*, 110 S.Ct. at 2979 (citing *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048). In *Akron II* the Court held that the Ohio statute satisfied this criterion, as it specifically required the court "to authorize the minor's consent where the court determines that the abortion is in the minor's best interest and in cases where the minor has shown a pattern of physical, sexual or emotional abuse." *Id.* (citing Ohio Rev. Code Ann. § 2151.85(C)(2) (Supp.1988)).

The Nevada bypass procedure, both at the initial judicial interview and at the petition hearing, allows the minor to show that *parental notification* would not be in her best interests, and requires the court to authorize the abortion in such instances. *See* NRS 442.255(2)(c) (at the interview, if, from information provided by minor, "[t]he *[parental] notice* required by subsection 1 would be detrimental to her best interests," the court shall authorize a physician to perform the abortion) (emphasis added); NRS 442.2555(3)(c) (at the hearing the court shall hear evidence relating to "[t]he minor's best interest *relative to parental involvement* in the decision whether to undergo an abortion") (emphasis added).

The language of these provisions does not meet the requirement of *Bellotti*. Rather than requiring the reviewing court to consider the minor's "best interests" generally, the Nevada statute requires the consideration of "best interests" only with respect to the possible consequences of parental notification. The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. Furthermore, in *Bellotti*, the court expressly stated, "[i]f, *all things considered*, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." *Bellotti*, 443 U.S. at 648, 99 S.Ct. at 3050 (emphasis added). Therefore, the Nevada statute impermissibly narrows the Bellotti "best interests" criterion, and is unconstitutional.

3.

Third, the bypass procedure must ensure the minor's anonymity. *Akron II*, 110 S.Ct. at 2979 (citing *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048). In *Akron II* the Court held that the Ohio statute satisfied this criterion.

> Section 2151.85(D) provides that "[t]he [juvenile] court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion." Section 2151.85(F) further states: "Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records." Section 2505.073(B), in a similar fashion, requires the court of appeals to preserve the minor's anonymity and confidentiality of all papers on appeal. The State, in addition, makes it a criminal offense for an employee to disclose documents not designated as public records.

110 S.Ct. at 2979.

Neither complete anonymity nor any specific procedure for ensuring confidentiality is required.

> Confidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance in the present context. The distinction has not played a part in our previous decisions, and, even if the *Bellotti* plurality is taken as setting the standard, we do not find complete anonymity critical. [The Ohio statute], like the statutes in *Bellotti* and *Ashcroft*, takes

> reasonable steps to prevent the public from learning of the minor's identity.

Id. at 2980.

The Nevada bypass procedure, at the initial judicial interview and the state district court petition hearing, sufficiently ensures the minor's confidentiality. *See* NRS 442.255(4) ("The court shall take the necessary steps to ensure the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential. The rules of civil procedure do not apply to any action taken pursuant to this subsection.").

Nevada's provision of "necessary steps" meets the "reasonable steps" standard of *Akron II*. The provision making the rules of civil procedure inapplicable in such proceedings will adequately protect the anonymity and confidentiality of pregnant minors. Following the lead of the Supreme Court, we refuse to base our decision on the facial validity of this provision requiring the courts to provide confidentiality on the mere possibility that the courts may illegally fail to do so. *Akron II*, 110 S.Ct. at 2980. NRS 442.255(4) meets the *Bellotti* confidentiality prong.

Appellees argue that the statute is not constitutionally sufficient because it requires the use of the minor's initials on the petition. *See* NRS 442.2555(2). The Supreme Court held in Ashcroft that the judicial bypass in question there assured the confidentiality of a female minor, despite requiring that the minor "file a petition setting forth [her] initials." 462 U.S. at 479 n. 4, 491 n. 16, 103 S.Ct. at 2519 n. 4, 2525 n. 16. Therefore, the Nevada

statute meets the *Bellotti* confidentiality requirement as to NRS 442.2555(2).

The Nevada Supreme Court's April 30, 1991, order provides that "any appeals taken pursuant to NRS 442.2555(5) shall be confidential." In *Akron II*, the court upheld the confidentiality provision of an Ohio statute which provided as follows:

> All proceedings [on appeal] shall be conducted in a manner that will preserve the anonymity of the appellant on appeal. All papers and records that pertain to an appeal under this section shall be confidential and not public records. . . .

The Nevada Supreme Court's order, like NRS 442.255(4), meets the *Akron II* "reasonable steps" requirement. We believe that the court's order, now implemented, will be followed and enforced. Therefore, we hold that NRS 442.2555(5), as implemented by Supreme Court order, meets the constitutional confidentiality requirements of *Bellotti*.

4.

Fourth, the bypass procedure must be conducted with expediency. *Akron II*, 110 S.Ct. at 2980 (citing *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048). In *Akron II* the Ohio statute specifically required that the trial court rule within five business days of the filing of the complaint, that the court of appeals docket an appeal within four days after the filing of a notice of appeal, and that the court of appeals render a decision within five days after docketing. *Id.* (citing Ohio Rev.Code Ann. §§ 2151.85(B)(1), 2505.073(A) (Supp.1988)). The court held

that the Ohio statute satisfied the expediency criterion, dismissing the argument that, under the provisions relating to the court of appeals, days referred to "business days" and thus the procedure could, in a worst-case analysis, take up to twenty-two calendar days. *Id.* at 2980-81.

The Nevada bypass procedure also specifically provides short time periods to ensure that the procedure is conducted with expediency at almost every level of the bypass procedure. *See* NRS 442.255(2) (court must interview minor within two judicial days of request); NRS 442.255(2), NRS 442.255(3) (court must issue order granting or denying authorization within one judicial day of interview; if order not issued, authorization deemed granted); NRS 442.2555(3) (court must hold hearing on merits of petition within five judicial days of filing). However, the statute does not contain *any* time period within which the state district court must rule upon a minor's petition under NRS 442.2555.

Appellants argue that the Nevada statute is similar to the Missouri statute that was upheld as constitutional in *Ashcroft*. Appellants fail, however, to support their argument with evidence that the Missouri statute did not impose a time constraint on the district court's review of a minor's petition. In fact, the only mention of expediency in *Ashcroft* comes in the context of discussing the conditions and requirements of appellate review. The Nevada statute does not require the state district court to conduct its review of a minor's petition with expediency. In contrast to the interview and authorization procedure provided in NRS 442.255, the review procedure in NRS 442.2555 places no time limit on the period during which

the district court may review the minor's petition, and the petition cannot be deemed granted if the district court fails to act within a given time period. Under the statute the district court could thus delay the bypass procedure indefinitely.[4] The district court review procedure does not meet the *Bellotti* expediency criterion.

Appellees argue that the statute is also constitutionally deficient because the bypass procedure does not require the Nevada Supreme Court to hear or rule on appeals within specific time periods, instead providing that "[t]he court shall, by court order or rule, provide for . . . expedited appellate review of cases appealed under this section." *See* NRS 442.2555(5).

Ashcroft applies to this provision, as it expressly requires expedited appellate review. 462 U.S. at 491 n. 16, 103 S.Ct. at 2525 n. 16. The Nevada statute's appellate

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[4] We acknowledge that the Supreme Court in *Akron II* did caution against invalidating a notification statute on a facial challenge based upon a worst-case analysis that may never occur. *See Akron II*, 110 S.Ct. at 2981. However, in *Akron II* the Court was considering a bypass procedure with a maximum time of twenty-two days, which the Court compared favorably with the seventeen-day period it upheld in *Ashcroft*, 462 U.S. at 477, n. 4, 491 n. 16, 103 S.Ct. at 2519, n. 4, 2525 n. 16. *See Akron II*, 110 S.Ct. at 2981.

While a seventeen or twenty-two day bypass procedure period satisfies the *Bellotti* requirement that the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain an abortion, an indefinite period does not. *See Akron II*, 110 S.Ct. at 2980; *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048.

review procedure "provides the framework for a constitutionally sufficient means of expediting judicial proceedings. . . . There is no reason to believe that [the state] will not expedite any appeal consistent with the mandate in our prior opinions." *Id.* Further, the Nevada Supreme Court's order which requires that appeals be "submitted to the court for expedited resolution" sufficiently ensures that expediency in the appeals procedure will be guaranteed to pregnant minors. Therefore, the Nevada Supreme Court expediency procedure is constitutionally sufficient.

However, because the Nevada statute does not require that the district court conduct its petition review with expediency to allow a minor an effective opportunity to obtain an abortion, we hold that the Nevada statute does not constitutionally satisfy the fourth *Bellotti* criterion and therefore does not suffice for a consent statute. *See Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048, *Akron II*, 110 S.Ct. at 2980.

C.

As noted *supra* at 5, the Court in *Akron II* found that because of "the greater intrusiveness of consent statutes . . . a bypass procedure that will suffice for a consent statute will suffice for a notice statute." *See Akron II*, 110 S.Ct. at 2979. Because we hold that the Nevada bypass procedure does not meet the constitutional requirements of a consent statute, we must consider whether it meets the requirements of the less intrusive notification statute. *See generally, H.L. v. Matheson*, 450 U.S. 398, n. 17, 411, 101 S.Ct. 1164, 1172 n. 17, 67 L.Ed.2d 388 (1981) ("we

expressly declined to equate notice requirements with consent requirements").

The Supreme Court has repeatedly espoused the importance of expediency in the abortion context. *See Akron II*, 110 S.Ct. at 2980-81; *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048. Delaying a woman's opportunity to undergo an abortion can create two serious problems. First, the health risks associated with an abortion increase significantly with delay. *See Matheson*, 450 U.S. at 439 & n. 25, 101 S.Ct. at 1173 & n. 25.

Further, under *Roe v. Wade*, every woman has a fundamental constitutional right to seek an abortion. 410 U.S. 113, 147-64, 93 S.Ct. 705, 724-32, 35 L.Ed.2d 147 (1973). That fundamental right, however, gradually yields to the state's interest in potential human life as fetal viability nears. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S.Ct. 3040, 3057, 106 L.Ed.2d 410 (1989). Therefore, if the abortion decision is hindered or burdened during the earlier stages of pregnancy, the performance of an abortion may be delayed until such time as the state can more extensively regulate the exercise of a woman's constitutional right. *See* NRS 442.250 (providing that all abortions performed after the twenty-fourth week of pregnancy must be performed in a hospital, by a licensed physician, and may only be performed "if the physician has reasonable cause to believe that an abortion currently is necessary to preserve the life or health of the pregnant woman").

There are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

> Yet an abortion may not be the best choice for the minor. The circumstances in which the issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for adoption, or assuming the responsibility of motherhood with the assumed support of the family, may be feasible and relevant to the minor's best interest. Nonetheless, the abortion decision is one that *simply cannot be postponed*, or it will be made by default with far reaching consequences.

Bellotti, 443 U.S. at 642-43, 99 S.Ct. at 3048 (emphasis added).

Because time is such a critical factor, relating both to a woman's health and the exercise of her constitutional right to an abortion, we conclude that the Nevada bypass procedure, which does not contain a time period within which the state district court must rule on a minor's NRS 442.2555 petition and thus may delay her right to implement the bypass procedure, possibly indefinitely, does not sufficiently protect a pregnant minor's constitutional right to an abortion. That Nevada has impermissibly constricted the meaning of "best interests" only adds to the infirmity.

IV.

We hold that a bypass procedure within a parental notification statute must meet constitutional scrutiny. Because we find that the Nevada bypass procedure fails to meet the requirements for a consent statute bypass, and also does not meet the expediency requirement for a notice statute bypass, we hold that the district court

properly enjoined NRS 442.255, NRS 442.2555, and NRS 442.257.

As the prevailing party on appeal, appellees are awarded attorney's fees and costs pursuant to 42 U.S.C. § 1988.

AFFIRMED.

APPENDIX

> § 442.255 Notice to custodial parent or guardian; request for authorization for abortion; rules of civil procedure inapplicable.
>
> 1. Unless in the judgment of the attending physician an abortion is immediately necessary to preserve the patient's life or health or an abortion is authorized pursuant to subsection 2, or [NRS 442.2555], a physician shall not knowingly perform or induce an abortion upon an unmarried and unemancipated woman who is under the age of 18 years unless a custodial parent or guardian of the woman is personally notified before the abortion. If the custodial parent or guardian cannot be so notified after a reasonable effort, the physician shall delay performing the abortion until he has notified the parent or guardian by certified mail at his last known address.
>
> 2. An unmarried or unemancipated woman who is under the age of 18 years may request a district court to issue an order authorizing an abortion. If so requested, the court shall interview the woman at the earliest practicable time, which must be not more than 2 judicial days after the request is made. If the court determines, from

any information provided by the woman and any other evidence that the court may require, that:

(a) She is mature enough to make an intelligent and informed decision concerning the abortion;

(b) She is financially independent or is emancipated; or

(c) The notice required by subsection 1 would be detrimental to her best interests,

the court shall issue an order within 1 judicial day after the interview authorizing a physician to perform the abortion. . . .

3. If the court does not find sufficient grounds to authorize a physician to perform the abortion, it shall enter an order to that effect within 1 judicial day after the interview. If the court does not enter an order either authorizing or denying the performance of the abortion within 1 judicial day after the interview, authorization shall be deemed to have been granted.

4. The court shall take the necessary steps to ensure that the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential. The rules of civil procedure do not apply to any action taken pursuant to this subsection.

§ 442.2555 Procedure if district court denies request for authorization for abortion: Petition; hearing on merits; appeal.

1. If the order is denied pursuant to NRS 442.255, the court shall, upon request by the minor if it appears that she is unable to employ counsel, appoint an attorney

to represent her in the preparation of a petition, a hearing on the merits of the petition, and on an appeal, if necessary. The compensation and expenses of the attorney are a charge against the county, as provided in the following schedule:

(a) For consultation, research and other time reasonably spent on the matter, except court appearances, $20 per hour.

(b) For court appearances, $30 per hour.

2. The petition must set forth the initials of the minor, the age of the minor, the estimated number of weeks elapsed from the probable time of conception, and whether maturity, emancipation, notification detrimental to the minor's best interests or a combination thereof are relied upon in avoidance of the notification required by NRS 442.255. The petition must be initialed by the minor.

3. A hearing on the merits of the petition, on the record, must be held as soon as possible and within 5 judicial days after the filing of the petition. At the hearing the court shall hear evidence relating to:

(a) The minor's emotional development, maturity, intellect and understanding;

(b) The minor's degree of financial independence and degree of emancipation from parental authority;

(c) The minor's best interests relative to parental involvement in the decision whether to undergo an abortion; and

(d) Any other evidence that the court may find useful in determining whether the minor is entitled to avoid parental notification.

4. In the decree, the court shall, for good cause:

(a) Grant the petition, and give judicial authorization to permit a physician to perform an abortion without the notification required in NRS 442.255; or

(b) Deny the petition, setting forth the grounds on which the petition is denied.

5. An appeal from an order issued under subsection 4 may be taken to the supreme court, which shall suspend the Nevada Rules of Appellate Procedure pursuant to N.R.A.P. 2 to provide for an expedited appeal. The notice of intent to appeal must be given within 1 judicial day after the issuance of the order. The record on appeal must be perfected within 5 judicial days after the filing of the notice of appeal and transmitted to the supreme court. The court shall, by court order or rule, provide for a confidential and expedited appellate review of cases appealed under this section.